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PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) A-7182/60374.0040US02
<p>I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)]</p> <p>on _____</p> <p>Signature_____</p> <p>Typed or printed name _____</p>		<p>Application Number 10/010,270</p> <p>Filed December 6, 2001</p> <p>First Named Inventor Harold J. Plourde Jr.</p> <p>Art Unit 2421</p> <p>Examiner Nguyen Ba, Hoang Vu A.</p>
<p>Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.</p> <p>This request is being filed with a notice of appeal.</p> <p>The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.</p>		
<p>I am the</p> <p><input type="checkbox"/> applicant/inventor.</p> <p><input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)</p> <p><input type="checkbox"/> attorney or agent of record. Registration number _____.</p> <p><input checked="" type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 <u>47,034</u></p>		
<p>/David Rodack/ _____ Signature</p> <p>David Rodack _____ Typed or printed name</p> <p>404.954.5049 _____ Telephone number</p> <p>June 19, 2009 _____ Date</p>		
<p>NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.</p> <p><input type="checkbox"/> *Total of _____ forms are submitted.</p>		

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re Application of:

Harold J. Plourde, Jr.

Confirmation No.: 5626

Serial No.: 10/010,270

Group Art Unit: 2421

Filed: December 6, 2001

Examiner: Nguyen Ba, Hoang Vu A

Docket No.: A-7182/60374.0040US02

For: Controlling Substantially Constant Buffer Capacity For
Personal Video Recording With Consistent User
Interface Of Available Disk Space

**REMARKS IN SUPPORT OF
PRE-APPEAL BRIEF CONFERENCE**

Mail Stop AF
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Applicant submits the following remarks in support of a request for a pre-Appeal Brief Conference.

REMARKS

Claims 1-3 and 5-47 are currently pending and subject to a final rejection per the final Office Action mailed on February 19, 2009. Of particular relevance to the present response, the final Office Action rejected independent claim 1 under 35 U.S.C. §103(a) as allegedly unpatentable over *Pierre et al.* ("Pierre," U.S. Patent No. 6,678,463) in view of *Ellis et al.* ("Ellis," U.S. Patent Application Publication 20020174430), the latter which allegedly (see page 11 of the final Office Action) incorporates U.S. Provisional No. 60/290,709 (filed May 14, 2001). The final Office Action rejected other claims using at least the aforementioned grounds for rejection, but for purposes of the present response, Applicants address the rejection to claim 1 for purposes of pointing out errors of fact and law. Applicants respectfully traverse the rejection, and respectfully submit that there exists clear cases of error, supported by the evidence in the record, in this rejection. Although Applicants believe errors in the rejection are evident for all independent claims, for purposes of conciseness in the pre-appeal brief conference, Applicants address the errors in a representative claim, and in particular, independent claim 1.

Claim 1 recites (emphasis added):

1. A system for managing the allocation and storage of media content instance files in a hard disk of a storage device coupled to a media client device in a subscriber television system, comprising:
 - a memory for storing logic;
 - a buffer space in the hard disk for buffering media content instances as buffered media content instance files; and
 - a processor configured with the logic to track the size of permanent media content instance files and the buffered media content instance files to provide a **visual indication of an amount of available free space, such that the indication is independent of the buffer space.**

As set forth in the final Office Action on page 12, it is acknowledged that *Pierre* does not disclose the above-emphasized features. The final Office Action alleges (page 12) that *Ellis* remedies this deficiency, and in particular, Figures 19-20 of the provisional (60/290,709). The final Office Action alleges the following (page 12):

It is noted that the "Recording Space Available: 14 hrs" in FIGs. 19 and 20 does not appear to be dependent upon buffer space.

Responding to Applicants' rebuttal (page 15-16, in Applicants' response filed on November 19, 2008, where Applicants note that there is no support for the allegation that the indication in *Ellis* is independent of the buffer space) of this allegation (the allegation also made in the non-final Office Action dated August 19, 2008, page 3), the final Office Action cites paragraph [0032] from the *Ellis* patent application publication, that portion reproduced below:

[0032] Storage space in a storage device may be assigned automatically or manually to buffer programming. An interactive television application may automatically assign all or a portion of the storage space in a storage device to buffer programming. If desired, a user may be provided with an opportunity to set the total size to be used for buffering, set the total number of buffers that can be active at one time, set the size of each buffer, and set how often buffers should be deleted.

The final Office Action (page 4, emphasis in original) further alleges, in response to Applicants' aforementioned rebuttal and in conjunction with paragraph [0032], the following:

that all of a portion of the storage space in the storage device can be assigned to buffering. Therefore, the storage space that is not assigned to buffering is clearly independent of the buffer space. Accordingly, the limitation "independent of the buffer space" is necessarily present in the description of the storage space that is not assigned to buffering.

Applicants respectfully disagree, and believe the rejection to be based on an error in law and fact.

Error in Law

Applicants respectfully submit that the rejection of claim 1 is based on an error in law. In particular, the citation to the *Ellis* patent application publication is an error in law since the filing date of the *Ellis* patent application publication (February 21, 2002) post-dates Applicants' effective filing date of December 6, 2001. One of the provisionals from which *Ellis* is alleged to base priority upon indeed has an effective filing date that predates Applicants' filing date, but does not support the cited paragraph [0032] from the post-dated application. In other words, the

citation to [0032] is in error since it only resides in a reference that post dates Applicants effective filing date, and hence is both not supported in the provisional application of *Ellis* and not an anticipatory reference. Further, although Applicants acknowledge that some instances may justify referral to a post-dated reference (MPEP 2124), the present circumstance does not fall under one of those exceptions. Accordingly, for at least the reason that the rejection is based on an error at law, a *prima facie* case of obviousness has not been established, and hence the rejection should be withdrawn.

Error in Fact

The analysis of the final Office Action reproduced above with regard to actual storage space and buffer space has no relevance to the claims at issue. That is, the rejection appears to confuse the physical make-up of the storage space in *Ellis* with the visual indication, which is an error in fact. Indeed, claim 1 requires that for the *visual indication of an amount of available free space*, the *indication is independent of the buffer space*, not that the buffer space be independent of the non-buffer space. For at least this separate reason, Applicants respectfully submit that the rejection evidences an error in fact and hence should be withdrawn.

CONCLUSION

Favorable reconsideration and allowance, or the re-opening of prosecution on the merits, of the present application is hereby courteously requested.

Respectfully submitted,

By: _____ /David Rodack/

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